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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1331

ERNEST MONTANYE, Superintendent of Attica Correctional Facility,

Petitioner,

against

ROBERT CLAYTON,

Respondent.

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office & P.O. Address
80 Centre Street
New York, New York 10013
488-3443

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

AMY JUVILER
Assistant Attorney General
of Counsel

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APPENDIX E

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

69-C-1275

May 13, 1971

UNITED STATES OF AMERICA ex rel. ROBERT CLAYTON,

Petitioner,

against

VINCENT MANCUSI, Warden of Attica Prison, Attica, N. Y.,

Respondent.

APPEARANCES:

MAURICE BRILL, Esq., Attorney for Petitioner Robert Clayton

HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Attorney for Respondent

MORTIMER SATTLER, Esq., Assistant Attorney General Of Counsel

BARTELS, D.J.

Petitioner, Robert Clayton, presently incarcerated in Attica Correctional Facility, Attica, N. Y., upon conviction, after a jury trial, of second degree murder, seeks his release through federal *habeas corpus*. He was sentenced to a term of thirty years to life imprisonment on February 25,

1953, and no appeal was taken from the judgment of conviction. His principal claim for release is the introduction at trial of his involuntary confessions in violation of his constitutional rights.

Pursuant to the decisions of *Jackson* v. *Denno*, 378 U.S. 368 (1964), and *People* v. *Hunfley*, 15 N.Y.2d 72 (1965), a *coram nobis* hearing was held on June 8th and 9th, 1965, in the County Court, Suffolk County, upon the issue of voluntariness. After making skeleton findings of historical fact, the County Court concluded "as a matter of fact and law" that the confessions were voluntary. That decision was affirmed by the Appellate Division, Second Department (*People* v. *Clayton*, 28 A.D.2d 543 (2nd Dept. 1967), Judge Christ dissenting upon the ground that the confessions were involuntarily obtained.[1] The Court of Appeals affirmed without opinion, 22 N.Y.2d 841 (1968), and the Supreme Court denied certiorari, 394 U.S. 909 (1969). Clayton thereupon filed the instant petition, asserting that his confessions were involuntary on the following grounds: (1) unreasonable delay in arraignment for more than sixty hours after his initial detention; (2) unlawful detention as a material witness prior to his confession; (3) subjection to continuous interrogation; (4) removal from police headquarters to the scene of the crime on two occasions; (5) denial of food and sleep during his detention; (6) failure to receive advice of the right to counsel and the right to remain silent; and (7) his limited intellectual capacity and poor education. Counsel was appointed by this court and a hearing subsequently held.

As no direct appeal was ever taken from the judgment of conviction, a certified transcript of the stenographer's trial notes was never made.[2] While certain uncertified portions of trial testimony of some witnesses (which apparently had been ordered by counsel for one or both sides during or after trial) have been produced from the files of the District Attorney, these out-of-sequence testimonial

fragments have been of only limited use to the court, and primary reliance has of necessity been placed upon the minutes of the State and Federal proceedings for collateral relief.

I

According to the *coram nobis* minutes, as supplemented by the transcript of the evidentiary hearing held in this court and portions of the trial testimony, the facts are as follows:

On November 3, 1952, at about 3 P.M., Clayton, an indigent, semi-literate potato picker on the Gozelski farm in East Northport, Long Island, was taken into custody along with approximately ten or eleven other people either employed or living at the farm, and brought to the Huntington Town Police Department headquarters for questioning in connection with a homicide which had occurred on the premises the previous day. Upon arriving at the station-house, Clayton and the others were placed in a room behind the seargent's desk, used primarily as a place for the changing of the policemen's shifts every eight hours. It was described as "a very small place," approximately 20 feet by 10 feet. The only furniture in the room consisted of a table and four or five armless wooden chairs. The lights in the room remained on all night. From time to time all through the night of November 3rd Clayton and the others were taken one at a time from the room to another, smaller room on the second floor for questioning by a group of police officers. Some questioning was also conducted in the larger room in the presence of all those in custody. Detective William Van Size, who was among others assigned to the homicide investigation, testified that he specifically spoke to Clayton at about 5 or 6 P.M. on November 3rd. At about 5 A.M. on November 4th a stenographer, Victor Bruns, was called in to transcribe a battery of questions put

to Clayton by a team of interrogators, consisting of Walter Weeks, an investigator with the District Attorney's office, Detective Van Size, and another detective, Alfred Kohler. Clayton's answers were also recorded, in the course of which he denied any connection with the homicide and in fact expressed his desire to bring the culprit to justice. The questioning lasted approximately forty-five minutes. Sometime during the late afternoon or evening of November 4th, Clayton was confronted by one B.J. Mickens, a co-worker, who stated that Clayton had killed the deceased and that he (Mickens) had helped Clayton carry the victim's body into the potato shed, where it was later discovered. Clayton nevertheless re-asserted his innocence and Mickens subsequently retracted his accusation.[3] Clayton was again questioned at 5 or 6 o'clock the evening of November 4th. At approximately 9 o'clock on the evening of November 4th Clayton and Mickens were both "arraigned" before Judge Fred Munder as "material witnesses". Immediately thereafter Clayton was remanded to the custody of the Sheriff of Suffolk County, in lieu of $10,000 bail, and placed alone in a small cell or lock-up, designed primarily for temporary detentions, containing a flat board, without a mattress, as the sole sleeping facility. He remained in that cell until he was arraigned on the charge of murder on November 6th, except for the periods he was removed for questioning.

On November 5th he was questioned several times during the day and may have been taken out to the scene of the crime that afternoon although this is not clear.[4] Following an interrogation of about one and a half to two and a half hours that evening, Clayton, in response to a series of questions propounded by Weeks, in the presence of Deputy Sheriff Otis Barnes and the stenographer, Otto Bruns, finally admitted the homicide. The interrogation was recorded on tape and by the stenographer beginning

at 10:10 P.M. on November 5th and was concluded at approximately 10:45 o'clock the same evening, although Weeks testified that the evening interrogation actually commenced at about 8 or 9 P.M.

Following this confession, Clayton, accompanied by more than ten police officers and investigators, was transported to the farm sometime around 11:30 P.M., where he proceeded to point out to the officers a number of objects connected with the homicide, which were seized by the investigators as evidence. The trial transcript reveals that further incriminating statements were made at the farm and introduced at the trial. Following Clayton's return to police headquarters, his earlier confession, which had in the meantime been transcribed from the stenographer's shorthand notes, was read to him, beginning at 2:15 A.M. on November 6th. He then dictated various changes which he later initialed, the entire process ending at about 3 A.M. At 3:12 A.M. Clayton requested permission to send a teelegram to his mother. The requeest was granted and the telegram, in which Clayton stated "I have killed a man", was admitted into evidence and read to the jury. Later that day Clayton was arraigned on a charge of murder.

II

The crucial question here presented is whether Clayton's confessions were voluntary under the "totality of the circumstances" (*Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969); *Clewis* v. *Texas*, 386 U.S. 707, 708 (1967)) and "the product of an essentially free and uncontrained choice" (*Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961)), rather than the product of a will overborne. *Lynum* v. *Illinois*, 372 U.S. 528 (1963). Upon this question, Clayton's guilt or innocence is immaterial.

After a review of all the available evidence, it is my view that the facts of this case reveal a clear pattern of

police dominance and psychological coercion which rendered the resultant confessions[5] inadmissible under the foregoing constitutional standards. Among the factors which I believe compel this conclusion are the following:

(1) During the 55-hour period of custody prior to Clayton's first inculpatory statement, he was never advised of his right to counsel, his right to remain silent, or that what he said could be used against him in evidence.[6] While the failure to advise an accused of these rights at the outset of interrogation does not automatically render confessions inadmissible in trials occurring prior to the holding in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), it is nonetheless "a significant factor in considering the voluntariness of statements later made". *Davis* v. *North Carolina*, 384 U.S. 737, 740 (1966); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Haynes* v. *Washington*, 373 U.S. 503, 510-511 (1963); *Culombe* v. *Connecticut*, *supra*, 367 U.S. at 610; *Turner* v. *Pennsylvania*, 338 U.S. 62, 64 (1949).

(2) Clayton's statements were secured following an initial taking-into-custody which was apparently without probable cause and followed by 55 hours of intermittent interrogation before he confessed. Approximately 30 hours after he was brought to the stationhouse, he was illegally arraigned as a "material witness", no criminal proceedings having been formally instituted at that time against anyone in connection with the homicide, in violation of the applicable New York statute.[7] There can be no doubt that at this point Clayton had become the target of the investigation and as stated by the majority of the Appellate Division, "defendant's commitment as a material witness * * * effectively amounted to the commencement of criminal proceedings against him" (28 A.D.2d at 543). Of all those originally taken into custody, only Mickens and Clayton were held as material witnesses and thereafter segregated from the others. Had Clayton been

arraigned as a defendant, he would have thereupon been informed of his right to counsel. New York Code of Criminal Procedure, § 308. The conclusion is virtually inescapable that the "material witness" proceedings were a sham, designed to prevent Clayton from obtaining counsel and to insure his availability for further interrogation away from the modicum of societal reinforcement which had theretofore been supplied by the group of suspects. *Cf. United States ex rel. Weinstein* v. *Fay*, 333 F.2d 815 (2d Cir. 1964).

United States ex rel. Glinton v. *Denno*, 309 F.2d 543 (2d Cir. 1962), *cert. denied*, 372 U.S. 938 (1963), 339 F.2d 872 (2d Cir. 1964), *cert. denied*, 381 U.S. 929 (1965); *United States ex rel. Allen* v. *LaVallee*, 411 F.2d 241 (2d Cir. 1969), *cert. denied*, 396 U.S. 971 (1969), are not to the contrary. In the *Glinton* cases, the original detention as a material witness was valid and was subsequently rendered only technically illegal as a result of the discharge of the grand jury. In addition, Glinton was at all relevant times represented by an attorney and had been advised by the court and his attorney at his initial arraignment of his right to remain silent. While detained, Glinton made several conflicting exculpatory statements which were later used by the prosecution as evidence of his guilty mind. The statements were found to have been in all other respects voluntary. The court merely held that a statement rendered during an illegal detention was not in admissible *per se*, stating: "Where the *only basis* for alleging that due process has been violated is the use of statements obtained during an illegal detention" (emphasis supplied); a state conviction would not be upset. However, the illegal detention of the accused is a factor to be weighed in the determination of voluntariness. *Clewis* v. *Texas*, *supra*.

In *Allen*, *supra*, the court stressed that the defendant was *in fact* "a material witness" since he had been placed

at the time and place of the crime with the prime suspect. Moreover, an eye witness had indicated that Allen did not strike the victim. Considering all the testimony on this issue before this court as well as the state court *coram nobis* transcript, it is my conclusion that Clayton's arraignment as a material witness was a sham, designed by the police to retain their dominance over him until they could extract a confession.

(3) The unreasonable delay in Clayton's arraignment as a defendant until some 60 hours after being brought into custody and more than 30 hours after he had clearly became the target of the investigation, is certainly a factor in determining voluntariness. *United States ex rel. Williams* v. *Fay*, 323 F.2d 65, 69 (2d Cir. 1963), *cert. denied*, 376 U.S. 915 (1964); *United States ex rel. Wade* v. *Jackson*, 256 F.2d 7, 15 (2d Cir. 1958), *cert. denied*, 357 U.S. 908 (1958).

(4) The record indicates that Clayton's faculties might well have been impaired and his will to resist significantly eroded by inadequate sleep and food. While there is some testimony to support the County Court's finding that Clayton was "permitted to sleep," the record raises substantial concern as to whether the treatment to which he was subjected substantially and effectively precluded sleep. During his stay in the back room of the stationhouse, from the afternoon of November 3rd to about 9 P.M. on November 4th, the only facilities for sleep were the floor, a long table and five armless wooden chairs. These facilities were to accommodate the sleeping needs of about ten people. The lights were on all night, and the ingress and egress of police officers and suspects were continued throughout Clayton's presence there. Thereafter he was removed to a cell which contained only a hard board for sleeping purposes. It is conceded that he had no sleep from his initial questioning on the early evening of Novem-

ber 5th until 3 A.M. the following day, when he completed the amendment of his confession, although Weeks testified that he saw Clayton sleeping on the floor just prior to the interrogation on the evening of the 5th. One witness stated "I recall them all lounging around the back room of the office, both on the floor, on the chairs and like that there" and "They were lounging around with their eyes closed and just generally lounging in the back." Detective Van Size stated, "Some were sleeping on the table. One guy was sleeping under the table." At the hearing before this court, the stenographer testified that at the interrogation during which Clayton amended his confession "there was a sense of fatigue" and "a stumbling over words." Thus, there can be little doubt that while Clayton may have been permitted to assume a supine position, any sleep he may have attained was hardly adequate to refresh himself and sustain his ability to resist continued questioning. *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698, 701 (2d Cir. 1955), *cert. denied*, 305 U.S. 896 (1955); *cf. Davis* v. *North Carolina*, *supra*, 384 U.S. at 746; *United States ex rel. Castro* v. *LaVallee*, 282 F.Supp. 718 (S.D.N.Y. 1968). Similarly, while there is also some evidence to support the County Court's finding that Clayton was "fed at regular intervals," the court entertains substantial doubt that the limited menu of hamburger and coffee over a period of over sixty hours was under his conditions of confinement adequate to renew Clayton's physical strength and his will to resist interrogation. *Davis* v. *North Carolina*, *supra*, 384 U.S. at 747.[8]

(5) The testimony of the witnesses as well as the transcripts of the various interrogations of Mickens and Clayton indicate that the suspects were exposed to persistent interrogation not by one but a team of interrogators. For example, during the questioning of Clayton in the early morning hours of November 4th, during which time he

denied knowing the perpetrator of the crime, Weeks, Van Size and Kohler alternately fired questions at Clayton. Such a procedure has long been recognized as a significant factor in determining the voluntary character of a confession.[9] *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Spano* v. *New York*, 360 U.S. 315 (1959); *Greenwald* v. *Wisconsin*, 390 U.S. 519 (1968).[10] This is particularly true where the accused did not make a narrative statement but rather, as here, was subjected to the leading questions of skillful prosecutors in a question and answer confession.[10] *Spano* v. *New York, supra*, 360 U.S. at 322.

(6) The continual questioning of Clayton over the course of two and a half days' custody must have had a substantial effect in eroding his will to resist. As aptly observed by the Supreme Court in *Culombe* v. *Connecticut*, *supra*, 367 U.S. at 575:

> "* * * questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks."

Cf. Davis v. *North Carolina*, *supra*, 384 U.S. at 752. This suggestion was especially applicable where Clayton was, at the outset, detained in a room with a number of co-workers, thus providing limited societal reinforcement, but was later removed to the confines of a small cell where his contacts were limited almost exclusively to the police.

The somewhat corroborative trial testimony of Elinora Burnett, Clayton's girlfriend, as to Clayton's guilt, does not lead me to believe that the introduction into evidence

of Clayton's confessions was harmless error beyond a reasonable doubt. Accordingly, Clayton's conviction must be overturned. See *United States v. Castello*, 426 F.2d 903 (2d Cir. 1970); *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

III

The State urges essentially two grounds for denial of the writ. First, it contends that the confessions were not the product of a will overborne, but rather were the result of the normal psychological drive to confess. It strongly advances the argument that the first confession was a direct result of the interrogators' confrontation of Clayton with the fact that one Mrs. Spatafora, the owner of a nearby bar, had identified Elinora Burnett, Clayton's girlfriend, as the woman who accompanied the man who cashed a $100 bill at her establishment shortly after the homicide. At the hearing before this court all parties, as well as the court itself, attempted to explore the incident more fully but to little avail. The memories of the witnesses had, understandably dimmed in the eighteen-year interval since the trial and their testimony in this area was vague and, in some respects contradictory. Consequently, they were unable to specify with any assurance the time of the confrontation, relative to the time of the confession, or otherwise, or the circumstances under which the incident occurred.[11] Moreover, it is not at all certain that Clayton's knowledge that the police had such information (which taken by itself would seem rather inconclusive on the issue of Clayton's guilt) would have prompted Clayton's confession had he not been subjected to the prior treatment outlined above. Even if one were to consider the aforementioned confrontation as the first direct accusation of Clayton or to infer that a direct accusation immediately

followed the confrontation, it would be necessary, under the circumstances, to consider the Supreme Court's observation that where one in custody is not directly accused of the crime "until after a substantial period of eroding his will to resist by a tangential line of interrogation" the "coercive influence brought to bear upon him" is not thereby reduced. *Davis* v. *North Carolina*, *supra*, 384 U.S. at 752.

Next, the State's attorney suggests that in light of the State court's post-hearing adverse determination of Clayton's claims, it was improper for this court to hold a hearing or reach a contrary conclusion on the issue of voluntariness without first determining that the State court proceedings fell within one or more of the eight criteria enumerated in 28 U.S.C. § 2254(d).[12] That this court has the inherent power to hold an evidentiary hearing on any petition for a writ of *habeas corpus* alleging facts which, if proved, would entitle the petitioner to relief, cannot be doubted. *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963); *Procunier* v. *Atchley*, 400 U.S. 446 (1971). The instant petition alleges such facts.

In any event, the court made it clear from the beginning that it would not re-determine those purely historical facts as reliably found by the County Court. Recognizing that the *coram nobis* proceedings were held more than thirteen years after the events in issue, when the memories of many witnesses had understandably faded, as well as the fact that some issues might have been more fully explored by the County Court, the court concluded that a more detailed exploration of the underlying facts was necessary, as a supplement to the State record, if the ultimate determination of voluntariness was to be properly reviewed. It was concerned with the County Court's rejection of all testimony respecting Clayton's advisement *vel non* of his rights before interrogation. At the State *coram nobis*

hearing, Judge Stark curtailed Clayton's attorney from eliciting whether Clayton had been advised of his right to counsel and his right to remain silent, stating "I am not going to consider that issue at all. * * * And it's totally irrelevant." Clearly, there was no finding by the County Court as to Clayton's advisement, and the rejection of such testimony, in view of other substantial evidence that actual coercion was exerted to overcome Clayton's will, raised a question as to the validity of the ultimate determination of voluntariness by the State court. *Compare, Procunier* v. *Atchley, supra; United States ex rel. Hughes* v. *McMann*, 405 F.2d 773 (2d Cir. 1968).

The issue of voluntariness under "the totality of the circumstances" is one of those mixed questions of law and fact, the determination of which is the very function of this court in *habeas corpus* proceedings. *Townsend* v. *Sain, supra; Watts* v. *Indiana, supra.* As the Supreme Court observed in *Townsend, supra*, 372 U.S. at 309, n. 6:

> "By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators * * *.' Brown v. Allen, 344 U.S. 443, 506 * * * (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense."

In *Watts, supra*, 338 U.S. at 51, the court also said:

> "* * * 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such

> standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication."

Accord, Imbler v. *State of California*, 424 F.2d 631 (9th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970).

Even were the court to treat voluntariness as a "factual issue" within the meaning of 28 U.S.C. § 2254(d) (*cf. United States ex rel. Coleman* v. *Mancusi*, 423 F.2d 985 (2d Cir. 1970), *cert. denied*, 400 U.S. 842 (1970)), it concludes that such determination by the County Court in this case is not fairly supported by the record (28 U.S.C. § 2254 (d)(8)) and hence subject to redetermination after an evidentiary hearing in this court. See *United States ex rel. Burns* v. *LaVallee*, 436 F.2d 1352 (2d Cir. 1970).

IV

In view of the judgment that the introduction into evidence of the confessions violated due process, it is unnecessary to decide the interesting question presented for the first time on oral argument, that the confessions, as the fruit of an unlawful arrest and detention, were rendered *per se* involuntary and inadmissible.[13] Nor is it necessray to entertain Clayton's claim under *Bruton* v. *United States*, 391 U.S. 123 (1968), which, we note in passing, has not as yet been presented to the State courts and is therefore not properly before us. *United States ex rel. Sloan* v. *McMann*, 415 F.2d 275 (2d Cir. 1969); *United States ex rel. Headly* v. *Mancusi*, 415 F.2d 277 (2d Cir. 1969), *cert. denied*, 399 U.S. 932 (1970).

Accordingly, Clayton's conviction must be overturned, and his petition for a writ of *habeas corpus* is hereby granted. He is therefore ordered released from custody

unless he is retried or an appeal is taken from this order within thirty (30) days from the date of the entry hereof. This is an order.

JOHN R. BARTELS
United States District Judge

FOOTNOTES

[1] The majority held that Clayton's illegal commitment as a material witness effectively amounted to the commencement of criminal proceedings against him, but that New York cases declaring confessions obtained thereafter inadmissible *per se* were not to be accorded retroactive application. The question of voluntariness under the totality of the circumstances was not discussed by the majority.

[2] The District Attorney's office of Suffolk County has informed the court that such a transcript is unavailable. Apparently, two stenographers were assigned to Clayton's trial. One has lost or destroyed his notes, and the other is retired and cannot be located.

[3] Prior to these events, on the afternoon of November 3rd, Mickens had confessed to the murder, but immediately thereafter recanted that confession. A later police investigation revealed that Mickens could not have been at the farm at the time of the homicide.

[4] The testimony on this point is contradictory. At the State *coram nobis* hearing, Van Size testified that Clayton was taken to the farm on the afternoon of the 5th. However, Judge Stark's findings of fact were silent as to a trip at that time. At the hearing before his court, an attempted exploration of the matter resulted in considerable confusion, Van Size insisting that while Clayton was taken to the farm on two occasions, both trips occurred subsequent to the confession on the evening of the 6th. A careful reading of the trial testimony of Kohler, however, suggests that, in all, three trips to the farm were made. The first, *without* Clayton, was made by a number of police officers on the afternoon of the 5th; the second, *with Clayton*, was made following the confession on the evening of the 5th; and the third, also with Clayton, was made on the afternoon of the 6th, subsequent to his amendment of the prior confession.

[5] As best as can be determined from the fragmentary record, a typewritten transcript of the stenographer's shorthand notes taken at Huntington Police Headquarters on November 7, 1952, when a

wire recording of the initial confession was played back, was introduced into evidence at the trial as People's Exhibit 30. In addition, the uncertified portions of trial transcript reveal that the stenographer read into the record a transcript of his original shorthand notes made during the initial confession on the evening of the 5th. There are some minor variations between the two transcripts. The stenographer also read into the record the transcript of his notes of the interrogation in the early morning hours of the 6th, during which Clayton amended in some respects his earlier confession.

[6] At the hearing before this court, Weeks testified that just prior to the questioning of Clayton on the evening of the 5th, he advised Clayton that anything he said could be held against him in a court of law. However, the stenographer's transcript of the questioning does not indicate that any such warning was given. In any event, Weeks admitted that he never advised Clayton of any other of his constitutional rights during the period prior to the confession.

[7] New York Code of Criminal Procedure, § 618-b.

[8] While there was testimony by Weeks at the *coram nobis* hearing that he saw Clayton eat on the evening of the 3rd, the evening of the fourth, and on the fifth, the nature of the food was never elicited. Clayton testified at the hearing before this court that prior to confessing, he was fed only on the evening of the third, and that his meal consisted of a hamburger and coffee.

[9] While it appears that four people were present at the interrogation on the evening of the 5th, the record indicates that only Weeks propounded the final series of questions leading to the confession.

[10] The transcript of the question and answer session on the evening of November 5th reads, in part, as follows:

> "Q. Bob, I told you before you have been lying and lying. We left you alone all day long, but we have just been building up stuff. Now, I got you in here tonight to talk to you, and you continued to lie to me.
>
> You didn't have any money. You didn't do it. Pretty near broke. You came home. When you turned the pocketbook over to Peggy, what was in it? A. When I turned it over to her, when I gave it to her—
>
> * * *
>
> Q. Now, tell us the rest of it. Get it off your mind, Bob. As I said, I don't think you ever intended to kill the man. I guess it was that you just thought you were going to get the money and get out. Now, get it off your mind, Bob. A.

Somebody tell me yesterday (mumbles) I am going to jail and stretch a bit.

Q. Get it off our mind, Bob. You have a hell of a load. You have been sitting down there all day. You wondered why the hell we didn't talk to you. We have been out digging up this stuff all day long. The only thing you can do is tell the truth, Bob, and hope and pray that it will help you.

Now, come on. Let's have the whole story. Start Saturday night. * * *

* * *

Q. Hold your head up. Tell us the story, Bob."

[11] As best as can be determined, Clayton was confronted with this information sometime during the afternoon of November 5th.

[12] 28 U.S.C. § 2254(d) reads in pertinent part as follows:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merit of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over he person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record."

[13] While this question has been raised before, it has not been authoritatively answered by the Supreme Court. See *Morales* v. *State of New York*, 396 U.S. 102 (1969); *Clewis* v. *Texas*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Collins* v. *Beto*, 348 F.2d 823 (5th Cir. 1965) [concurring opinion of Friendly, J.]. *Cf. United States* v. *Edmons*, 432 F.2d 577 (2d Cir. 1970).

APPENDIX F

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 218—September Term, 1971.

(Argued October 8, 1971 Decided January 17, 1972.)

DOCKET NO. 71-1696

HON. VINCENT A. MANCUSI, Warden
Attica State Prison,
Respondent-Appellant,

v.

UNITED STATES *ex rel.* ROBERT CLAYTON,
Petitioner-Appellee.

Before:

WATERMAN and SMITH, *Circuit Judges,*
and ZAMPANO,* *District Judge.*

Appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* 326 F. Supp. 1366 (E.D.N.Y. 1971), granting petitioner's writ of *habeas corpus* and directing his release unless he is granted a new trial.

Affirmed.

* United States District Judge for the District of Connecticut, sitting by designation.

SAMUEL A. HIRSHOWITZ, First Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Amy Juviler, Assistant Attorney General, of counsel), *for Respondent-Appellant.*

FREDERIC BLOCK, Centereach, New York, *for Petitioner-Appellee.*

ZAMPANO, *District Judge:*

This is an appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *J.*, granting petitioner's writ of *habeas corpus* and directing his release unless he is retried by the state.

Petitioner, Robert Clayton, was convicted of second degree murder on February 25, 1953, after a trial in which his confession was introduced as evidence. He did not appeal his conviction, but in 1965 sought relief in a *coram nobis* hearing in the County Court, Suffolk County, asserting that his confession was involuntary. That court denied relief on the ground that the confession was a voluntary one. The Appellate Division, Second Department, and the Court of Appeals affirmed, whereupon petitioner unsuccessfully sought *certiorari* in the United States Supreme Court. Petitioner then commenced this action for a writ of *habeas corpus* in the District Court which held an extensive hearing and granted the writ based upon its finding that the confession was involuntary.

The facts surrounding the making of the confession are set forth in Judge Bartels' comprehensive opinion below, 326 F.Supp. 1366 (E.D.N.Y. 1971); therefore only a brief summary is necessary. Petitioner, a semi-literate itinerant farm worker, was taken into custody along with 11 others at about three o'clock in the afternoon of November 3, 1952,

as part of an investigation into a homicide which had occurred the previous day on the farm where he was working. Except for repeated periods of questioning in another room by the police, he was confined in a small and practically bare room with the others throughout the night and the next day. On November 4th a co-worker implicated petitioner in the murder after first having given a false confession himself, and that evening petitioner was "arraigned" as a "material witness." At no time was petitioner informed of his rights. Thereafter he was isolated from the others who were taken into custody with him, and he alternated between interrogation sessions with the police and confinement in a small cell with only a flat board for sleeping. The record is not clear as to whether, and how adequately, petitioner slept and ate. He finally confessed to the murder late in the evening of November 5th, approximately 55 hours after having been taken into custody. The interrogation was finally concluded at approximately three o'clock in the morning of the next day, November 6th, and later that day he was arraigned as a defendant.

The District Court relied on six factors to support its conclusion that the confession, under all the circumstances, was involuntarily made: (1) the failure to advise petitioner, an indigent and uneducated suspect, of his rights to counsel and to remain silent; (2) the "sham" arraignment as a material witness for the purpose of retaining police dominance over petitioner; (3) the unreasonable delay in arraignment as a defendant for over 60 hours after having been taken into custody; (4) doubt that petitioner had adequate food and sleep; (5) persistent interrogation by a skilled team of investigators; and (6) continual questioning over a period of two and a half days.

In reaching its conclusion the District Court applied the test, whether the confession was voluntary under "the totality of the circumstances," which is conceded by appel-

lant to be the correct legal standard. See, *e.g.*, *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). Appellant nevertheless disputes the validity of the factors on which the District Court relied, attacking each in turn as being insufficient in itself to show coercion. While appellant may be correct were each factor considered in isolation, such a position is only peripherally relevant. Because of the inherent complexity of a judgment which must depend upon the simultaneous weighing of various circumstances, the process of determining voluntariness involves more than "a mere color-matching of cases." *Beecher* v. *Alabama*, 389 U.S. 35, 38 (1967). Rather, the touchstone in evaluating all the factors surrounding the making of a confession is the principle that the confession is voluntary if it is the product of an essentially free and unconstrained choice and involuntary if the product of a will overborne. *Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963), *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961).

It seems clear that petitioner's persistent denials of guilt throughout two days of constant police questioning and despite a direct accusation by a co-worker demonstrate that it was his will not to confess. The appellant suggests that it was the petitioner's free choice to change his mind because he learned that a bar owner had identified the petitioner's girlfriend as the person who accompanied a "man who cashed a $100 bill at her establishment shortly after the homicide." This rather inconclusive piece of evidence, it is argued, was the catalyst which stimulated the petitioner's "normal psychological drive to confess." Judge Bartels found, and we agree, that this bit of information would hardly have prompted the petitioner to confess. Rather, it is apparent that the petitioner's lack of education and knowledge of his rights coupled with the circumstances of prolonged custody and repeated periods of questioning by trained interrogators convinced the petitioner that "the

police wanted answers and were determined to get them." *Culombe, supra,* at 625. There is little doubt that petitioner was under tremendous psychological strain and physical discomfort. The only way obvious to him to reduce these coercive influences was to do and say what the police demanded of him. Under these circumstances, we conclude that the findings of the District Court that the petitioner's will was eroded and that the confession was a result of a pattern of police dominance and coercion were not erroneous.

Appellant further argues, independently of the question of the voluntariness *vel non* of the confession, that the judgment of the District Court should be reversed because it exceeded its authority when it held a hearing and redetermined issues previously decided by the state courts. However, in applying the legal standard of voluntariness to the historical facts surrounding the confession, the determination which results is not a conclusion of fact but one of law, or at most a mixture of fact and law. See *Jackson* v. *Denno,* 378 U.S. 368, 391 (1964); *United States ex rel. Burns* v. *LaVallee,* 436 F.2d 1352, 1356 (2 Cir. 1970), *cert. denied,* 402 U.S. 1012 (1971). Therefore the District Court properly redetermined the federal constitutional question for itself. *Townsend* v. *Sain,* 372 U.S. 293, 318 (1963).

Moreover, it was proper under the facts of this case for the District Court to hold an evidentiary hearing. It was by no means clear that the County Court applied the correct constitutional standard in ruling on the voluntariness of the confession. That court excluded evidence on whether petitioner was advised of his rights on the ground that it was irrelevant although the lack of such advice was a circumstance which had some bearing on the issue of voluntariness. It made no findings with respect to the propriety of the arraignment of petitioner as a material witness and the delay in arraignment as a suspect until after he had

confessed, factors which likewise must weigh in the balance. Finally, the Appellate Division in affirming the County Court relied on certain principles of nonretroactivity which are not relevant in making a judgment under "the totality of the circumstances." *Davis* v. *North Carolina*, 384 U.S. 737, 740 (1966). Because it was not clear that the County Court applied the correct standard, and because its findings of fact were, as the District Court characterized them, "skeletal," it was proper to hold an evidentiary hearing rather than attempting to reconstruct the facts from the state court record. *Townsend* v. *Sain*, *supra*, at 314; *United States ex rel. Liss* v. *Mancusi*, 427 F.2d 225, 229 (2 Cir. 1970). The District Court, having found that "a more detailed exploration of the underlying facts was necessary," fully complied with the requirements of 28 U.S.C. § 2254(d).

Accordingly, the judgment of the District Court is affirmed.

APPENDIX G

Order for hearing issued by District Court

ORDER FOR HEARING

68-C-1275

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA ex rel. ROBERT CLAYTON,
Petitioner,

against

VINCENT MANCUSI, Warden of Attica Prison, Attica, N.Y.,
Respondent.

Upon reading the petition and the return filed by the Attorney General of the State of New York in the above entitled action, and after due consideration, it is hereby

ORDERED that the Attorney General of the State of New York, as attorney for the respondent, show cause at a hearing to be held before this Court on the 1st day of July, 1970, at 10 A.M., Courtroom No. 4, why a writ of *habeas corpus* should not be issued.

Service of a copy of this Order shall be made by the Clerk of this Court by mailing a copy thereof to the Attorney General of the State of New York, 80 Centre Street, New York, N.Y. 10013, and by mailing a copy of this Order to the petitioner and to his attorney, Maurice Brill, Esq., 291 Broadway, New York, N.Y. 10007.

Dated: Brooklyn, N.Y.,
June 16, 1970.

JOHN R. BARTELS
United States District Judge.

APPENDIX H

Order for a stay granted by the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of March, one thousand nine hundred and seventy-two.

United States ex rel. Robert Clayton,
Relator-Appellee,

v.

Vincent R. Mancusi,
Respondent-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated January 28, 1972, to stay the issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

It is further ordered that

s/ STERRY R. WATERMAN
Sterry R. Waterman
J. Joseph Smith, U.S.C.J.

Circuit Judges

s/ ROBERT C. ZAMPANO
Robert C. Zampano
U.S.D.J.

APPENDIX I

Order for bail granted by the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of March, one thousand nine hundred and seventy-two.

United States ex rel. Robert Clayton,

Relator-Appellee,

v.

Vincent R. Mancusi,

Respondent-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated March 16, 1972, for bail be and it hereby is granted.

It is further ordered that bail may be set at $500 personal recognizance without surety.

s/ STERRY R. WATERMAN
Sterry R. Waterman (per JJS)

s/ J. JOSEPH SMITH
J. Joseph Smith

Circuit Judges